U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 29Jan2002

CASE NO.: 2001-LHC-856

OWCP NO.: 18-73391

In the Matter of:

BARRY PARKER
Claimant

v.

MARINE CORPS EXCHANGE
Respondent

APPEARANCES:

Jeffrey Winter, Esquire
For the Claimant

Christopher M. Galichon, Esquire
For the Respondent

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

DECISION AND ORDER

The above-captioned claim arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act" or "LHWCA"), as incorporated in the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et. seq.*, 5 U.S.C. § 2105(c) and the implementing regulations. The claim is brought by Barry Parker (hereinafter "Claimant") against Marine Corps Exchange, a permissibly self-insured employer (hereinafter "Respondent").

PROCEDURAL HISTORY

The claim was referred to the Office of Administrative Law Judges on December 20, 2000. Claimant is seeking temporary total disability benefits for an alleged low back injury that occurred on May 15, 2000.

A hearing was conducted in San Diego, California on June 11, 2001 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing Respondent's Exhibits Nos. 1 through 17, Claimant's Exhibits Nos. 1 through 16, and Administrative Law Judge's Exhibits Nos. 1 and 2 were received into evidence.[1] At the time of the hearing, the record remained open for the submission of the deposition transcripts of Drs. Bernicker and Faerber, and the opinion of Dr. Greenfield in response to any additional opinions offered by Dr. Bernicker. Dr. Bernicker's deposition testimony has been marked as Claimant's Exhibit 17. Dr. Faerber's deposition testimony has been marked as Respondent's Exhibit 18, and Dr. Greenfield's supplemental report has been marked as Respondent's Exhibit 19.

Additionally, Claimant submitted the supplemental report of Dr. Bernicker, dated July 30, 2001. There was no objection to the admission of this report. The report has been marked as Claimant's Exhibit 18. Claimant submitted a closing statement, Respondent and Claimant filed reply statements. All of this evidence has been made part of the record.

UNCONTESTED ISSUES

The parties have stipulated to the following:

1. Jurisdiction exists under the Nonappropriated Fund Instrumentalities Act extension of the Longshore and Harbor Workers' Compensation Act.

2. An employer/employee relationship existed at the time of the accident on May 15, 2000.

3. Claimant noticed and filed a timely claim for benefits under the Act.

4. Respondent filed a timely controversion of the claim for benefits.

5. Claimant's earning capacity on May 15, 2000 is $408.40.

(TR 4). I find that these stipulations are supported by the evidence of record in this claim. Therefore, the stipulations have been accepted.

ISSUES

1.) Whether Claimant suffered an injury on May 15, 2000 that arose out of and in the course of Claimant's employment with Respondent.

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[1] The following abbreviations have been used in this opinion: RX = Respondents' exhibits; CX = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

2.) Whether Claimant has been provided with a free choice of physician.

3.) Whether Claimant has reached maximum medical improvement.

4.) Whether Claimant is entitled to temporary total disability benefits.

5.) Whether Claimant is entitled to interest on past due benefits.

6.) The reasonableness of the medical treatment rendered to Claimant.

7.) Whether Claimant's attorney is entitled to fees and costs.

Findings of Fact and Conclusions of Law

Hearing Testimony

Claimant's Testimony

At the time of the formal hearing in this matter, Claimant testified that he possesses an Associate Degree in Administration of Justice from Santa Barbara City College and a GED. (TR 19). On cross-examination, Claimant stated that he also possesses a real estate license, paralegal training and certification, in addition to having graduated from Muir Technical School in November, 1988. (TR 51). Claimant stated that he has been employed previously by several different employers in the maintenance and construction industry. (TR 19). Claimant stated that he is no longer able to operate a motor vehicle because he is unable to operate the manual transmission due to pain in his back and knee, and that Claimant is unable to stand for an extended period, stoop, twist, bend or lift. (TR 21). Claimant began working for Respondent on November 15, 1999. (TR 22). Claimant went on to testify as to the circumstances surrounding the incidents of May 15, 2000. (TR 22).

Claimant testified that he stepped into the back of a box van to replace some tools around lunchtime. (TR 22). Claimant stated that he was stepping out of the truck when he stepped first onto the bumper of the truck and then "a pretty good distance to the ground." (TR 22). Claimant stated further that when he stepped from the back of the truck, he did not see that there was a pothole. Claimant testified that when his foot hit the ground his "knee collapsed, twisted and [Claimant] felt a sharp pain in my knee joint." (TR 22). Claimant went on to state that he had no prior injuries to his knee or ankle. (TR 22).

After Claimant fell, "it took a while to get up, and [he] staggered over to the truck that – my two friends saw me that I work with...." (TR 22). Claimant stated that he then "kind of rolled to my side, pushed myself up and hobbled over to the truck and rested for awhile." (TR 22). Claimant notified his immediate supervisor that he had fallen and that in doing so he had twisted his ankle and

knee. (TR 23). Claimant was then told by his supervisor to deliver the tools that had already been loaded and then fill out an accident report and report to the hospital. (TR 23). At approximately 4:00 p.m. on the day of the injury, Claimant had filled out the accident report and reported to the Naval Hospital. (TR 24). Claimant stated that he had tried to report to the "Occupational Health and Safety" office, but that the office was closed for the day. (TR 24).

Claimant then reported to the emergency room of the hospital where he was treated around 6:00 p.m. (TR 24). The hospital iced and bandaged the ankle and instructed Claimant to report to the occupational health office the next day. (TR 24). When Claimant reported to the occupational health office on May 16, 2000, x-rays of the ankle were taken, and Claimant was instructed to stay on bed rest for 3 days icing and elevating the ankle and taking anti-inflammatory medications. (TR 24). Claimant was treated at the occupational health office by someone Claimant believed was a physician named H.R. Sullivan.[2] (TR 25).

Claimant saw Mr. Sullivan on "3 or 4" occasions. (TR 25). Claimant stated that at this time, he only had complaints concerning his ankle and knee. (TR 25). Claimant stated that Mr. Sullivan treated only Claimant's ankle. (TR 55). Claimant was restricted to desk duty and told to report back to Mr. Sullivan for a follow up examination in one week. (TR 25). After that one week, Claimant began to feel better and was returned to full duty. (TR 25). Claimant went back to work at full duty after 10 days and worked until July 1, 2000. (TR 25). Claimant testified that he complained to his supervisors on several occasions, stating that he was unable to perform his normal duties. (TR 26).

Claimant approached Maria Lanzziano on July 24, 2000 and requested help because his back, ankle, and knee injuries were worsening and Claimant was experiencing pain in his hips. (TR 26 & 36). Claimant told Ms. Lanzziano that his condition was not improving. (TR 36). Claimant found Ms. Lanzziano to be helpful in helping him secure treatment from a physician . (TR 36). Claimant went on to explain the circumstances surrounding how Claimant came to choose Dr. Faerber as his treating physician. Claimant stated that when he went to see Ms. Lanzziano for help for his continued pain on July 24, 2000, and at that time he filled out the choice of physician form. (TR 35).

Claimant testified that it was his recollection that he was not under the impression that he could chose any doctor, but that he must chose a physician from the list provided by Ms. Lanzziano. (TR 35). However, Claimant also stated that he was told that the list of physicians was provided as a convenience for Claimant. (TR 37). Claimant then recounted the following exchange between himself and Ms. Lanzziano,

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[2] It later came to light that H.R. Sullivan is actually a nurse practitioner in the Occupational Medicine Section of the Naval Hospital.

> "And I said, 'Well is there any others besides this?' And she said 'Well, this is all I've got. At this point you need to choose one off this list.'"

(TR 37). Claimant stated that he understood that if he did not choose a physician from the list provided that the medical care costs would not be covered. (TR 35). Claimant also stated that he understood that if he did not complete the choice of physician form, that he could not be treated. (TR 35). Claimant went on to state that he was not provided with a telephone book from which to chose a physician. (TR 35). Claimant testified that he attempted to contact other physicians on the list provided, but that he could not "remember quite what happened, but [Claimant] could not get ahold of them." (TR 36). On cross-examination, Claimant clarified that Dr. Faerber was actually not his first choice of physician. (TR 53). Claimant had first chosen Dr. Joel Heiser to be his treating physician.

Claimant stated that when he first saw Dr. Faerber regarding the incident on May 15, 2000, Claimant reported having pain in his hips and back. (TR 26). Claimant testified that he expressed these concerns to Dr. Faerber on numerous occasions, but that Dr. Faerber appeared "preoccupied with the lesion that was located in the distal femur of [Claimant's] left leg." (TR 26). Claimant went on to state that he told Dr. Faerber that he was experiencing pain that traveled from Claimant's hip to his ankle. (TR 27). In the week or so between Claimant's first and second visit with Dr. Faerber, Claimant was sent to physical therapy. (TR 27). Also in Claimant's first visit, Dr. Faerber conducted a physical examination and ordered an x-ray and MRI study. (TR 28).

At the time of the first visit with Dr. Faerber, Claimant testified that his ankle continued to hurt. (TR 28). Claimant reported to Dr. Faerber on the first visit that he was experiencing quite a bit of pain in his left ankle and that he was experiencing difficulty walking. (TR 28). Claimant also reported to Dr. Faerber that he was experiencing pain in his left knee. (TR 28). Claimant told Dr. Faerber that he had twisted his knee and ankle and immediately felt pain. (TR 29). Later, Claimant stated that he reported all of his concerns to Dr. Faerber, but that Dr. Faerber ignored the back complaints. (TR 48). Claimant opined that Dr. Faerber became preoccupied with the lesion in Claimant's left ankle after the MRI study was completed. (TR 29).

After the discovery of the lesion on the MRI, Dr. Faerber recommended that Claimant see an oncologist for further evaluation. (TR 29). Claimant then went to see Dr. Sehgal, an oncologist, who told Claimant that the lesion did not appear to be a serious condition, but recommended further evaluation. (TR 29). Claimant then saw Dr. Vaughn in connection with the left knee lesion. (TR 30). Claimant testified that his visit to Dr. Vaughn cost him approximately $120.00 out of pocket. (TR 30). Dr. Vaughn determined that Claimant's left knee lesion was in fact benign. (TR 30). Claimant testified that Dr. Vaughn expressed to Claimant that the pain in Claimant's left knee was due to "muscle atrophy surrounding the infected area, that he believed there was something wrong in the knee joint." (TR 31).

Claimant was seen by Dr. Faerber approximately 3 or 4 times for treatment. Claimant testified that he informed Dr. Faerber of pain traveling from his hip into his ankles as early as August, 2000. (TR 32). Claimant stated that his back pain was never treated by Dr. Faerber, and that Dr. Faerber treated only Claimant's knee and ankle. (TR 33). Dr. Faerber eventually returned Claimant to limited work duty. (TR 37). Claimant testified that after being returned to work with this limited duty, that he was asked by Respondent to perform tasks that violated the limitations. (TR 37). Claimant appealed to Ms. Lanzziano who he found very helpful. (TR 37). Claimant remained on limited duty until the last date that he worked. (TR 37).

Claimant stated that in mid-August, 2000, he began treatment with Dr. Bernicker. (TR 31). Claimant reported to Dr. Bernicker that he had been diagnosed as having a lesion in his left knee, but Claimant was unaware of what was causing him pain. (TR 31). Claimant also stated that he reported to Dr. Bernicker that he was experiencing pain in his back and hips that radiated down through his legs and into his ankles and feet, in addition to cramping in the calf and hamstring muscles. (TR 32). On cross-examination, Claimant did not know why the his report of pain in both of his lower extremities was not noted. (TR 53).

Claimant did state that Dr. Bernicker's report does accurately reflect the symptoms that Claimant expressed to Dr. Bernicker. (TR 57). Claimant was unsure why Dr. Bernicker is the only doctor to note an immediate onset of back pain on May 15, 2000. (TR 57). Claimant testified that Dr. Bernicker addressed his issue of back pain. (TR 48). Claimant stated that Dr. Bernicker had an x-ray performed on Claimant's first visit and prescribed physical therapy for the back condition. (TR 48). The physical therapy was denied. (TR 48). Claimant has not been seen by any other physician since he began to treat with Dr. Bernicker. (TR 48). Claimant is seen by Dr. Bernicker approximately every 6 weeks. (TR 50).

Claimant was placed on temporary total disability status on December 12, 2000. (TR 38). Claimant also explained that he took leave to attend his doctor and physical therapy appointments. (TR 43). Claimant testified that he was told by his supervisor that he was required to take vacation and sick time to attend his appointments. (TR 43). Claimant then testified that he was given compensation funds for the time that he attended the appointments, but that he returned the check to Respondent to "buy back" the vacation and sick leave. (TR 44). Claimant also testified that he paid for many prescriptions out of his own pocket. (TR 44).

Claimant assessed that his ankle condition was healed at the time of the hearing. (TR 44). Claimant feels that any pain that remains in his ankle is likely to have been caused by his back condition. (TR 45). Claimant then went on to assess the condition of his left knee. Claimant believes that the knee has "been a problem since the accident." (TR 45). Claimant explained that the pain is "right in the knee joint." (TR 45). Claimant stated that the pain occurs with walking up stairs, bending, stooping, and twisting. (TR 45). Claimant believes that he would be unable to perform his usual employment with his knee pain. (TR 45). Claimant then went on to discuss his back condition.

At the time of the hearing, Claimant stated that he experiences constant pain in his low back that radiates into his hips. (TR 46). Claimant stated that he also experiences cramping in his feet when he lies flat and that he is required to walk to make the cramping cease. (TR 46). For these conditions, Dr. Bernicker prescribed the use of "pain killers and muscle relaxers." (TR 46). Claimant explained that at the time of the accident on May 15, 2000, he "thought" that he had felt pain in his back, but that such pain was overshadowed by the pain in Claimant's ankle. (TR 46).

Claimant estimated that he began to first experience pain in his back in late June or early July of 2000. (TR 46). Claimant stated that he reported back and leg pain to his supervisor and that he felt that his "back's really vulnerable." (TR 47). After a couple of days of reporting this pain, Claimant stated that he saw Ms. Lanzziano and explained to her that "the pain [was] too much and [Claimant] was afraid of re-injuring [himself]." (TR 47). This is the point at which Claimant selected Dr. Faerber as his treating physician. (TR 47). Claimant stated that considering the present condition of his back, he could return to his usual employment "if [he] wanted to be crippled for the rest of my life [he] probably could." (TR 50).

On cross-examination, Claimant attempted to explain discrepancies between his deposition testimony and his hearing testimony. (TR 58-63). Claimant in the deposition transcript admits that he experienced back stiffness before the date of the injury. (TR 58). Additionally, Claimant explained that he must have been mistaken when he stated that he believed that he had copied every "leave chit" that he used when attending physician and physical therapy appointments. (TR 60-63).

Maria Lanzziano

Maria Lanzziano testified at the time of the formal hearing in this matter. Ms. Lanzziano is a human resource specialist with Respondent. (TR 72). Ms. Lanzziano stated that she specializes in workers' compensation claims and that it is her responsibility to attend to claims and accident reports. (TR 72). Ms. Lanzziano stated that she is familiar with Claimant's May 15, 2000 accident because she received an accident report on May 16, 2000. (TR 73). Ms. Lanzziano stated that when she receives an accident report, it is her usual policy to complete a LS-202, contact the employee's immediate supervisor to inquire as to the circumstances surrounding the accident, contact Contract Claims Services, and inquire as to the medical status of the employee involved in the accident. (TR 73).

Ms. Lanzziano stated that she received an emergency room report pertaining to Claimant from Claimant's supervisor. (TR 74). Ms. Lanzziano also testified that she was aware that Claimant had a follow up appointment on May 16, 2000 at the occupational health division and Claimant was placed on no duty status for 2 days. (TR 74). Ms. Lanzziano went on to state that Claimant again sough treatment from Mr. Sullivan on May 18, 2000. (TR 74). Claimant was returned to work on that date, but took the remainder of May 18, 2000 off of work. (TR 74). Claimant returned to his normal work duties on May 22, 2000. (TR 75).

Ms. Lanzziano saw Claimant again on June 5, 2000. (TR 75). Ms. Lanzziano had faxed copies of the forms Claimant was required to complete to receive payment for the 3 days that he was off of work related to the May 15, 2000 accident. (TR 75). Claimant appeared at Ms. Lanzziano's office with the forms. (TR 76). One of the forms was the choice of physician statement, and on it, Claimant had designated the facility where Mr. Sullivan is located to be his treating physician. (TR 76 & 93). At this point, no discussion occurred between Ms. Lanzziano and Claimant regarding any other physicians. (TR 76).

The next time that Ms. Lanzziano spoke with Claimant was when Claimant received payment for the sick and annual leave that Claimant had taken to attend his appointments. (TR 76). At that time, Claimant endorsed the checks back to the payroll department. (TR 76). Ms. Lanzziano explained how it comes about that injured employees use annual and sick leave to attend appointments related to on the job accidents. Ms. Lanzziano explained that when an employee is injured, the employee can choose to take annual leave, sick leave or workers' compensation leave for any time off of work related to the accident. (TR 77).

Ms. Lanzziano explained further that if an employee chooses to take workers' compensation leave, the employee is paid at only 66 2/3% for the time missed. (TR 77). However, if the employee uses sick or annual leave, the employee is paid at the full rate for the time off of work. (TR 77). When the employee is paid by workers' compensation for the time off of work after the annual or sick leave is taken, the employee can buy back the leave at 66 2/3% and the leave time is returned to the employee for future use. (TR 77). The end result, Ms. Lanzziano explained, is that the employee is paid at the normal rate of pay and loses only 1/3 of the leave used. (TR 77).

Claimant next sought out Ms. Lanzziano on July 21, 2000 because Claimant was experiencing pain in his knee and was in need of an orthopedic surgeon. (TR 77). Initially, Claimant chose Dr. Heiser as the treating physician. (TR 77). At the time that Claimant made the choice, he was given a list with physicians names and specialties. (TR 78). Ms. Lanzziano testified that Claimant was never told that he was required to choose a physician from the list provided. (TR 78). Ms. Lanzziano reiterated that the list is provided merely as a convenience to employees. (TR 86). Ms. Lanzziano further testified that Claimant was told that he could choose a physician from the list or any local physician. (TR 78). Ms. Lanzziano does not recall Claimant asking to use a telephone book at this time. (TR 78).

Claimant was unable to schedule an appointment with Dr. Heiser. (TR 79). Claimant returned to Ms. Lanzziano's office on July 24, 2000. (TR 79). Ms. Lanzziano was not in the office on that date and Ms. Lanzziano's assistant provided Claimant with an additional choice of physician form. (TR 79). Ms. Lanzziano testified that her assistant is aware of the fact that the employee is entitled to a free choice of physician and Ms. Lanzziano has observed her assistant informing employees of this free choice. (TR 79). Ms. Lanzziano stated that she believes, although she was not present for the

conversation, based on her previous observations of the assistant, that Claimant was informed that he is entitled to free choice of physician on this date also. (TR 79 & 86).

Ms. Lanzziano explained she can approve a change in physician if no appointment has occurred. (TR 88). However, Ms. Lanzziano stated that once a designation of treating physician is made, only Contract Claims Services can approve the change. (TR 88). Ms. Lanzziano further testified that she is able to authorize treatment for an employee without knowing the specific doctor's name. (TR 90). She is able to do this by providing Claimant with a LS1 form that the employee is instructed to return when a physician has been chosen. (TR 90). Ms. Lanzziano further explained that Claimant could request authorization for treatment from Contract Claims Services directly, but that she was informed by Contract Claims Services that once a physician is designated, that designation cannot be changed. (TR 91). Ms. Lanzziano also explained that she permitted Claimant to select Dr. Heiser because it was a change from an "on-base" provider to a provider located "off-base." (TR 92). Additionally, Claimant was referred to an off-base specialist by the on-base provider. (TR 92).

On July 25, 2000, Claimant was returned to modified duty status by Mr. Sullivan. (TR 79). At that time, Claimant was not permitted to climb and was assigned a desk job. (TR 80). Ms. Lanzziano testified that she is not aware of any time when Claimant was asked to exceed his work restrictions. (TR 80). Ms. Lanzziano notified Claimant by letter dated December 8, 2000, that although Dr. Bernicker was not being recognized as Claimant's treating physician, because different doctors had designated different work restrictions, Respondent was going to follow the restrictions placed on Claimant by the physician of his choosing, Dr. Bernicker. (TR 81). After being sent this letter, Claimant worked only a couple of hours in the modified job. (TR 81). Ms. Lanzziano had received limitations for Claimant from 3 health care providers, Mr. Sullivan and Drs. Faerber and Bernicker. (TR 88).

Ms. Lanzziano saw Claimant in August, 2000 when Claimant presented Ms. Lanzziano with several doctors' notes. (TR 82). During the conversation when Claimant reported to Ms. Lanzziano, Claimant expressed his concerns regarding continuing knee pain. (TR 82). Ms. Lanzziano also was aware that on Claimant's second visit to Dr. Faerber, a lesion was found on Claimant's knee. (TR 82). Claimant never mentioned back pain nor any lower extremity pain to Ms. Lanzziano. (TR 82). Ms. Lanzziano stated that Claimant first had ankle pain, but in August 2000, Claimant was reporting "basically" knee pain. (TR 82).

In August, 2000, Ms. Lanzziano stated that Claimant expressed concern regarding the knee lesion and not having health insurance. (TR 83). Ms. Lanzziano then spoke with the staffing manager to inquire into whether Claimant could procure emergency medical insurance. (TR 83). Ms. Lanzziano was told by the staffing manager that no such program to provide emergency insurance existed. (TR 83). Shortly after this inquiry, Ms. Lanzziano received documentation from Claimant's attorney. (TR 83). Ms. Lanzziano concluded that Claimant never reported back pain to her. (TR 84). If Claimant had done so, Ms. Lanzziano would have reported the injury to Contract Claim Services. (TR 84). Ms.

Lanzziano testified that the first time she was informed of any problems with Claimant's back was when Claimant's attorney served her with papers. (TR 85).

Dr. Richard Greenfield

Dr. Richard Greenfield testified in connection with the above-captioned claim. Dr. Greenfield is board certified in orthopedic surgery. (TR 98). Dr. Greenfield estimates that approximately 90% of his practice involves treating patients, with the remainder being spent engaging in "some sort of forensic endeavor." (TR 98). In rendering an opinion as to Claimant's condition, Dr. Greenfield examined Claimant, reviewed the medical records, and the radiographs. (TR 99). Dr. Greenfield reviewed a MRI study report that was presented at the time of the hearing. (TR 100). Dr. Greenfield explained that the MRI showed the 3 lower segments of the thoracic spine. (TR 100). Dr. Greenfield found that Claimant's MRI showed abnormal chronically degenerative worn out discs. (TR 100).

Dr. Greenfield interpreted Claimant's lumbar spine MRI to show "routinely degenerative bulging discs there facet degenerative changes, which are the particular joints at L5-S1, which is probably the most abnormal level in the pure lumbar spine." (TR 100). Dr. Greenfield interpreted the report to show that a degenerative process had been going on for a long period of time. (TR 101). Dr. Greenfield also noted that the report indicated a posture disc protrusion of moderate size. (TR 101). This indicates that the disc space has collapsed and that the disc space acts as "a shock absorber without any of the shock absorbing material in the center and it just starts bulging out." (TR 101).

However, Dr. Greenfield found that the most significant finding on Claimant's MRI study report was that the left S1 nerve root is compressed or irritated by the bulging disk. (TR 101). Dr. Greenfield characterized this as "a very chronic process" and that the process "goes along with the enlarged facts in the narrowed foramina or tunnels that the nerves run out through." (TR 101). Dr. Greenfield found that the report showed a person who had "abused or stressed their spine for many, many years." (TR 101). Dr. Greenfield opined that this degenerative process is seen with microtrauma to the spine that has occurred over a 5 to 10 year period. (TR 101). Dr. Greenfield found nothing in the report to indicate an acute injury. (TR 102).

Dr. Greenfield found that if the MRI film showed a S1 ridiculopathy that Dr. Greenfield would expect the pain to radiate from the lower back or buttocks into the left leg. (TR 103). Additionally, if this condition exists, Dr. Greenfield would expect the S1 or ankle jerk to be absent or diminished or sensory changes on the lateral area of the foot, or weakness in the calf muscle. (TR 103). Dr. Greenfield pointed out that none of the reports regarding Claimant's condition mention any of these conditions or symptoms. (TR 104). Dr. Greenfield further explained that Claimant "lacked every criteria for disc herniation or acute herniation or S1 nerve root compression." (TR 104).

Dr. Greenfield went on to discuss the condition of Claimant's left ankle. (TR 105). Dr. Greenfield pointed out that the documentation noted mild anterior instability in Claimant's left ankle. (TR 105). Dr. Greenfield stated that this is usually in reference to some ligament damage. Dr. Greenfield found a "bit of" anterior drawer, but Dr. Greenfield would not characterize the condition as instability. (TR 105). Dr. Greenfield found no instability when he examined Claimant's ankle. (TR 106). Dr. Greenfield opined that there is nothing to suggest that Claimant's ankle sprain should not have healed in the 6 week period following the accident. (TR 106). Dr. Greenfield also found no radiographic evidence of any persistent problems with the left ankle. (TR 107).

On physical examination, Dr. Greenfield's "only positive finding was a subjective complaint of diffuse mild tenderness, particularly on the inside of the patella." (TR 107). Dr. Greenfield found no atrophy in Claimant's left thigh or calf which suggests to Dr. Greenfield that there is no significant pathology in the knee or spinal canal. (TR 108). In reviewing Dr. Vaughn's report, Dr. Greenfield does not believe that Claimant suffered a miniscal tear. (TR 109). Dr. Greenfield found that Claimant's knee MRI showed a 48 year old medial meniscus with degeneration between the superior and inferior leaflets of the medial meniscus. (TR 110).

Dr. Greenfield went on to discuss his clinical evaluation of Claimant. (TR 112). Dr. Greenfield noted Claimant's abnormalities as follows:

> presentation with a stocking sensory loss from the ankle distally, ... which would essentially mean that he had lost the peripheral portions of the third, the fourth, the fifth, and first sacral roots.

(TR 112). Dr. Greenfield determined that these findings were associated with "either peritneuropathy, ... or a toxic exposure to Toleween, or chemicals such as that, or a misrepresentation by the patient of the sensory depth set." (TR 112).

Dr. Greenfield found that Claimant's knee MRI showed no signs of a significant pathological process. (TR 114). Dr. Greenfield concluded that Claimant's left knee and right lower extremity complaints nearly 10 months after the date of the accident make "no sense, whatsoever." (TR 114).

Dr. Greenfield pointed out that Claimant's back complaints began months after the date of the accident. (TR 114). Dr. Greenfield does not believe that there is a correlation between Claimant's back complaints and the circumstances surrounding Claimant's accident. (TR 114). Additionally, Dr. Greenfield finds it worthy of noting that Claimant's symptoms have worsened instead of improving with the normal healing process. (TR 114).

Claimant described his back pain as warranting a 7 out of 10 rating, with the condition worsening in bad weather. (TR 115). Claimant's subjective complaints include pain radiating to both feet bilaterally with numbness and tingling in both legs. (TR 115). However, Dr. Greenfield's physical examination of Claimant does not correlate with these complaints. (TR 115).

Claimant also presented to Dr. Greenfield with complaints of a constant aching pain in his hips and pelvis. (TR 115). Dr. Greenfield found nothing in his physical examination of Claimant's hip that would indicate a hip problem. (TR 115). Claimant reported pain in his upper left leg and a pain that traveled from his knee up into the leg constantly to Dr. Greenfield. (TR 115). Dr. Greenfield found nothing in the physical examination of Claimant to substantiate or explain the source of the complaint. (TR 115).

Claimant also reported right knee pain to Dr. Greenfield. (TR 116). Dr. Greenfield found his examination of Claimant's right knee to be unremarkable with no evidence of trauma or injury. (TR 116). Claimant also reported a feeling of instability in the right knee to Dr. Greenfield. (TR 116). Dr. Greenfield found no instability in Claimant's right knee. (TR 116). Claimant also reported to Dr. Greenfield that he is unable to walk stairs, and that he has constant locking of the knee joint. (TR 116). Dr. Greenfield found no objective evidence that would lead to knee instability, locking, or collapsing. (TR 116). Dr. Greenfield also concluded that the lesion present in Claimant's knee is not causing any of Claimant's pain. (TR 116).

Dr. Greenfield concluded that Claimant did not suffer an injury to his back. (TR 117). Dr. Greenfield opined that if Claimant had suffered any injury to his back on May 15, 2000, then the symptoms should have manifested within a day or two of the accident. (TR 117). Dr. Greenfield "would expect complaints of soreness, stiffness, loss of motion, spasm guarding" or something like that within that day or two. (TR 117). Dr. Greenfield found no evidence in the record of these complaints ever being made. (TR 117).

On cross-examination, Dr. Greenfield stated that Claimant's working from November, 1999 through August, 2000 contributed to Claimant's cumulative micro-trauma in Claimant's back. (TR 118). Claimant's MRI was "consistent with micro-trauma wear and tear." (TR 118). However, Dr. Greenfield found that Claimant's MRI indicates that Claimant should be experiencing no symptoms. (TR 119). Dr. Greenfield would expect that Claimant would experience, at most, aching soreness and stiffness in cold and damp weather. (TR 120).

Dr. Greenfield found Claimant's subjective back complaints not to make any sense. (TR 120). Dr. Greenfield found that Claimant would benefit if he improved his overall physical condition by exercising and used anti-inflammatory medications. (TR 121). Dr. Greenfield imposed restrictions on Claimant's work activities, including any activities that exacerbate the soreness and stiffness and no impact sports. (TR 121). On redirect examination, Dr. Greenfield explained that the limitations were not a result of Claimant's May 15, 2000 accident. (TR 135). However, Dr. Greenfield stated that the

limitations were a result of the microtraumas that Claimant had sustained over his lifetime. This includes the time that Claimant was employed by Respondent. (TR 138). Dr. Greenfield pointed out that there is no evidence that the May 15, 2000 injury aggravated Claimant's back condition. (TR 139). Dr. Greenfield also noted that Claimant had a normal gait and erect posture at the time of the examination. (TR 122).

Dr. Greenfield acknowledged that Dr. Faerber noted a "mildly antalgic gait favoring the left lower extremity" at the time of the Dr. Faerber's examination on August 3, 2000. (TR 124). Dr. Greenfield explained that this might have been noticed by Dr. Faerber when Claimant was continuing to heal from the ankle sprain and sore knee. (TR 123).

Dr. Greenfield also discussed Dr. Vaughn's March, 2001 report. (TR 124). Dr. Vaughn noted that Claimant showed a "slightly antalgic gait." (TR 124). Dr. Greenfield pointed out at this point that when assessing a patient's condition, the physician cannot be overly influenced by findings that require the patient's cooperation. (TR 124). Dr. Greenfield stated that he has had patients that have aggravated their back conditions because of an antalgic gait. (TR 125).

Dr. Greenfield found that Claimant's back pain radiating into the ankle is probably indicative of a condition other than a back injury. (TR 126). Pain that radiates from his hip to his ankle, of which Claimant has complained, Dr. Greenfield opines is usually indicative of tendinitis. (TR 127). Dr. Greenfield, when questioned regarding the veracity of his recording of symptom, stated that he himself takes a patient's history to assure that all of the pain is accurately described. (TR 128).

Respondents' Exhibits

Medical Evidence

In support of its position in this claim, Respondent offers the written report of Dr. Richard Greenfield, dated April 4, 2001. (RX 1). Dr. Greenfield examined Claimant on March 14, 2001 and subsequently prepared a written report. Dr. Greenfield is a board certified orthopedic surgeon and has published numerous writings. (RX 1). Claimant had reiterated the circumstances surrounding how the accident on May 15, 2000 had occurred. Dr. Greenfield noted that Claimant indicated that he had initially experienced symptoms in his left knee and left ankle. Claimant stated to Dr. Greenfield that he returned to full time work 4 to 6 weeks after the accident and that he continued to experience pain in his entire left leg and his lower back. Claimant also related to Dr. Greenfield that he had made complaints about his ongoing symptomology, but that no one would listen. Dr. Greenfield notes that Dr. Bernicker is the first physician to note that Claimant was suffering from back problems.

Dr. Greenfield noted that Claimant reported constant pain in his back rated as a 7 out of 10. Claimant also stated that the pain worsens with inclement weather and that the pain is constant and radiates into his feet bilaterally and that Claimant experiences numbness and tingling in his legs and

experiences back spasms. Claimant informed Dr. Greenfield that he began experiencing the back pain approximately 1 1/2 months after the initial injury.

Claimant also told Dr. Greenfield that he experiences constant aching and pain in his hips and pelvis that he rates as a 7 out of 10. Claimant stated that the pain radiates from his back to his upper left leg and pain that travels from his left knee to his upper leg. Claimant rates these pains as being between a 5 and 7 out of 10. Claimant reported to Dr. Greenfield that he experiences pain in his right knee that is from his back. Claimant stated that the pain manifests by the knee popping and locking and that Claimant experiences trouble in traveling the stairs. Claimant also stated that he is unable to squat because that activity causes low back pain and right ankle pain.

Claimant also reported to Dr. Greenfield that he experiences left knee problems. Claimant characterizes his left knee as not being the same since the date of the accident. Claimant believes that the left knee is unstable and that the knee pops when bending. Claimant characterized the feeling as if "with stress that it will blow out." Claimant stated that he avoids stairs and is unable to squat. Claimant also complained of pain in both of his ankles, the right ankle popping and being generally painful and the left ankle aching. Claimant reported pain in both of his feet. Claimant stated that the right foot pain is a result of his back problem and that the foot cramps and is numb. Claimant reported that the left foot hurts constantly and results in numbness up to his knee. Claimant denied having any previous problems with his back, hips. pelvis, upper legs, knees, lower legs, ankles, or feet.

In rendering his opinion, Dr. Greenfield conducted a thorough record review and reviewed several x-rays. Dr. Greenfield also conducted a physical examination of Claimant. Dr. Greenfield found no pain in Claimant's thoracolumbar spine and found that Claimant was able to move without restriction. Claimant's gait and posture were observed to be normal. Dr. Greenfield noted Claimant's subjective complaints to include diffuse tenderness from L2-S1 and across the back at that level. Dr. Greenfield found no list, lumbar, nor thoracic spasm when Claimant completed the full unrestricted range of motion for his thoracolumbar spine. However, Claimant did experience pain when bending to either side.

Dr. Greenfield found Claimant's hip range of motion to be full, unrestricted, and unguarded. Claimant did experience pain on the extremes of the internal and external rotation of the right hip. Claimant's lower extremity motor examination was unremarkable. Claimant exhibited shaking during the examination. Dr. Greenfield found Claimant's sensory examination to be within normal limits when dealing with the right lower extremity. However, Claimant's foot and ankle on the left was numb showing a diminished sensation from above the malleoli distally.

Claimant's knee and ankle jerks were found to be symmetrical, and Claimant's sitting straight leg raises and supine straight leg raises were negative. Claimant shook with the sitting straight leg raises because he was "weak." Dr. Greenfield found the circumference of Claimants' calves, knees, and

thighs to be approximately the same between the right and the left. Dr. Greenfield also noted that Claimant is able to heel and toe gait with a little shaking.

Dr. Greenfield conducted an examination of Claimant's ankles and found the subjective complaint of tenderness in the right ankle. Dr. Greenfield found the right ankle to be stable when under all stress tests. Claimant was able to walk with a normal gait and had "excellent VMO development bilaterally." Claimant's knees were also examined. Dr. Greenfield found Claimant's collateral ligaments to be intact bilaterally and that the Lachman Test and the Anterior Drawer were negative. Dr. Greenfield found Claimant's right knee to be completely non-tender and the left knee to show complaints of medial and mid-patellar tenderness.

Dr. Greenfield listed his impressions to include:

> 1. history of spraining injury to the left ankle, resolved; 2. history of minor spraining injury of left knee, resolved; 3. lesion distal femur, possible non ossifying fibroma, non-industrial; 4. recent onset of complaints of back pain; 5. recent onset of complaints of right lower extremity symptomology, including right knee, right ankle, right foot; 6. recent onset of complaints of foot symptomology.

Dr. Greenfield found that Claimant "at most sustained a minor spraining injury to his left ankle and left knee on May 15, 2000." Dr. Greenfield's review of the MRI film indicates to him that the left knee sprain and the left ankle sprain should have resolved fully over the 2 to 3 months after the injury. Beyond that time period, Dr. Greenfield opines that it "would not seem medically reasonable that [Claimant] would have required ongoing care or treatment to the left knee or left ankle. [Claimant] would have suffered no permanent residual disability nor deformity to the left ankle or knee."

Dr. Greenfield determined that Claimant would have no residual disability nor deformity as a result of the May 15, 2000 injury. Dr. Greenfield found no need for medical care as a result of the May 15, 2000 accident beyond the 2 to 3 month period. Dr. Greenfield also concluded that Claimant could have continued to be employed in his usual and customary employment.

Dr. Greenfield opined that the causation of Claimant's left ankle and left knee injuries were a result of the May 15, 2000 accident. However, Dr. Greenfield noted that Claimant presented to him with "a litany of increasing complaints." Dr. Greenfield went on to explain that Claimant did not report any back symptomology until December, 2000. Claimant explained the omission of this information from the reports could be blamed on the fact that all of the previous care givers refused to acknowledge the back complaints. Dr. Greenfield finds this explanation to be "noncredible."

In reviewing Claimant's medical records, including the physical therapy notes, Dr. Greenfield found that prior to December 5, 2000, Claimant made no report of back symptoms, right lower extremity problems, nor feet symptoms. The only complaints noted before that time involved the left knee and left ankle. Dr. Greenfield found that as time progressed, Claimant added complaints. Dr. Greenfield pointed out that since Claimant started seeing Dr. Bernicker for treatment, Claimant added complaints concerning his right knee, right lower extremity, right ankle, right foot, and numbness in both lower extremities.

Dr. Greenfield finds it "medically improbable" that all of the treating physicians and care givers refused to note Claimant's back complaints. Dr. Greenfield also finds it "medically improbable" that Claimant would develop right lower extremity symptomology that is presently being reported by Claimant. Dr. Greenfield concluded that no further treatment to Claimant's left lower extremity nor Claimant's right lower extremity is required. Dr. Greenfield opined that no back treatment is necessary for Claimant on an industrial basis.

Dr. Greenfield found that Claimant's distal femur lesion should be "worked up" on a non-industrial basis, and that the lesion was not caused nor aggravated by Claimant's employment with Respondent and that the lesion was present before the May 15, 2000 accident. Dr. Greenfield found Claimant's left lower extremity complaints to be non-credible and that the shaking Claimant exhibited indicates Claimant was attempting to exhibit weakness that was not actually present. Dr. Greenfield found Claimant's "rather intense" left lower extremity complaints to be non-credible based on the absence of calf or thigh atrophy. Dr. Greenfield opined that Claimant's stocking loss of sensation in the left lower extremity is a non-atomic response and that the numb area would involve multiple nerve roots and such complaint indicates a "factitial complaint."

Based on his review of Claimant's history, the records in this matter, and his physical examination of Claimant, Dr. Greenfield found none of this evidence to substantiate that Claimant suffered an industrial injury to his back or right lower extremity. Dr. Greenfield also found no substantiation for any ongoing orthopedic problems in the left lower extremity.

Dr. Greenfield also submitted a supplemental report in this claim on July 24, 2001. (RX 19). In rendering this report, Dr. Greenfield reviewed the deposition testimony of Dr. Bernicker and Faerber, the hearing transcript, and his own previous report. Dr. Greenfield found his opinion to be adequately represented by the hearing testimony and the April, 2001 report. Dr. Greenfield pointed out that Dr. Faerber noted Claimant's injuries were limited to the left lower extremity with no significant injuries to the left upper extremity, spine, or right lower extremity.

Dr. Greenfield also points out that Dr. Bernicker found no motor or sensory deficits in Claimant's lower extremities. Dr. Greenfield opines that Claimant's sensory deficit is nonphysiologic with no anatomical basis associated with any trauma, and unsupported by the documentation that he reviewed.

Dr. Greenfield clarified that Claimant's hip complaints "may have been characterized as 'sciatica'." Dr. Greenfield noted that Dr. Faerber evaluated Claimant's hip complaints to rule out a back injury, and Dr. Bernicker did not find a positive straight leg raise test, both of which indicate that Claimant does not suffer from sciatica nor is there any nerve root compression nor irritability. In his own physical examination, Dr. Greenfield found Claimant's straight leg raise test to be negative and found Claimant's reflexes to be symmetrical. Dr. Greenfield found nothing in the record to suggest that Claimant suffers from sciatica or any nerve root compression.

Dr. Greenfield found Claimant suffered a left lower extremity injury that had been properly diagnosed and treated by Dr. Faerber. Dr. Greenfield clarified that altered gait did not cause a disc herniation in Claimant's back. Dr. Greenfield points out that at the end of Dr. Faerber's treatment, Dr. Faerber had noted that Claimant exhibited a normal gait. Dr. Bernicker notes this phenomenon at a much later date, and Dr. Greenfield finds that "this is not a viable concept." Dr. Greenfield explained that altered gait can result in soreness, stiffness, or discomfort in the back, but does not result in disc herniation. Dr. Greenfield stated that he finds Dr. Bernicker's opinion as it relates to a disc herniation to be "incorrect."

The treatment records of Dr. Wade Faerber are also included in the record in this claim. (RX 4). Dr. Faerber is board certified in orthopedic surgery and is affiliated with four hospitals. Dr. Faerber is also the team physician for Cypress College and is a faculty member at the College of Osteopathic Medicine of the Pacific. (RX 3). Dr. Faerber's records are dated between August 3, 2000 and September 15, 2000. Dr. Faerber rendered an orthopedic consultation regarding Claimant on August 3, 2000.

Claimant presented to Dr. Faerber with complaints involving his left knee and ankle with no previous injury. Claimant relayed the circumstances surrounding the accident to Dr. Faerber. Claimant described his job to Dr. Faerber to be a carpenter/painter/maintenance. Claimant also reported to Dr. Faerber that he was experiencing constant ankle pain that became worse with walking and any increased activity. Additionally, Dr. Faerber noted that Claimant reported frequent pain in his left knee when he was doing any sort of twisting activity. Dr. Faerber conducted a physical examination at the time of the orthopedic consultation, and noted that Claimant had a "mildly antalgic gait favoring the left lower extremity." Dr. Faerber also noted that Claimant's left knee exhibited a "point of maximal tenderness over the lateral joint line with a positive meniscal rotation sign." The range of motion test for the left knee showed full extension.

Claimant's left ankle showed maximal tenderness "over the anterior talofibular ligament region." Dr. Faerber conducted neurologic testing that showed Claimant's sensation to be normal in all dermatomal areas. Dr. Faerber conducted a x-ray of Claimant's left knee and ankle that showed "no gross abnormalities." Dr. Faerber's assessment of Claimant's situation was that he needed to rule out a lateral meniscal tear in the left knee, and that Claimant was status post left ankle sprain, and that the left

ankle showed mild residual anterior instability. Dr. Faerber prescribed physical therapy three times per week over the following two weeks for Claimant's ankle and an MRI for Claimant's knee.

At this time, Dr. Faerber released Claimant to work with limitations that included no walking or standing for over 4 hours per 8 hour day, no repetitive bending or stooping, and no climbing. Claimant was initially evaluated by a physical therapist on August 7, 2000 who noted that Claimant complained of left knee and left ankle pain. On August 17, 2000, Dr. Faerber designated Claimant as being temporarily partially disabled, but able to return to modified work on that same date with the same restrictions as the August 3, 2000 report.

A MRI report, dated August 8, 2000 is included in Dr. Faerber's record. The MRI was interpreted by Dr. Kenneth Chon. Dr. Chon found that the MRI showed no meniscal tear, but did raise the possibility of neoplastic process. Dr. Faerber authored an Interim Report on August 17, 2000 addressing Claimant's left knee and left ankle. Objectively, Dr. Faerber noted that Claimant's left knee showed tenderness over the medial femoral empicondylar region. This tenderness was greater than the tenderness in the lateral join line. Again, Claimant's knee exhibited a full range of motion.

Dr. Faerber's test for instability was unremarkable. Claimant's ankle range of motion was full. Subjectively, Claimant reported to Dr. Faerber that he continues to experience pain in both the left ankle and left knee. X-rays were not taken at this time, but Dr. Faerber noted a MRI was done on August 8, 2000. The MRI showed a lesion along the left distal femoral metaphysis. Dr. Faerber assessed that Claimant's situation as follows: "1. status post left ankle sprain with residual anterior stability; 2. lesion distal left femur rule out malignancy v. sprain superimposed upon a sclerotic nonossifying fibroma." Dr. Faerber limited Claimant's work activities to no standing or walking over 4 hours per 8 hours day and no climbing.

Dr. Faerber authored an additional Interim Report on September 7, 2000 assessing Claimant's left knee and left ankle injuries. Dr. Faerber noted the objective evidence of continued tenderness over the medial femoral metaphysical and the medial femoral empicondylar regions of the left knee. Claimant had full range of motion in his knee at this time and there was no joint line tenderness and the instability testing resulted in unremarkable results. Claimant's ankle exhibited tenderness over the anterior talofibular ligament region. Claimant's lower extremities were intact from a neurovascular position.

Dr. Faerber assessed that Claimant was status post left knee and ankle sprain, as well as having a lesion on his left distal femur. On September 7, 2000, Dr. Faerber released Claimant to work with no lifting over 25 pounds, no stooping or squatting, and no stair or ladder climbing.

Dr. Faerber was also deposed in connection with the above-captioned claim on July 12, 2001. (RX 18). Dr. Faerber testified that he examined Claimant on 3 separate occasions, and that he was treating Claimant for problems with his ankle and knee. Dr. Faerber noted that Claimant's history showed no indication of an injury to his back. On cross-examination, Dr. Faerber stated that when a

patient presents to him with multiple pains that include a back complaint, the back complaint is usually the prominent complaint. Dr. Faerber did not conduct diagnostic tests aimed at diagnosing a low back injury because Claimant made no complaints concerning that area. On August 18, 2000, Claimant reported to Dr. Faerber that he was experiencing pain traveling from his hip into his ankle. Dr. Faerber examined Claimant and found no indication of sciatica.

In some of his reports, Dr. Faerber noted that Claimant had a slightly antalgic gait. Dr. Faerber found that Claimant's gait improved with treatment. Dr. Faerber opined that if Claimant had injured his back on May 15, 2000, he would have expected to see the symptoms of the injury manifest by the time that Dr. Faerber examined Claimant on August 3, 2000. Dr. Faerber found no atrophy in Claimant's lower extremities. Dr. Faerber testified that he would have expected to see atrophy by the time of his first examination of Claimant if there had been a significant injury to Claimant's lower extremity. Dr. Faerber found Claimant's ankle jerk tests to be symmetrical. Dr. Faerber testified that Claimant made no complaints regarding a lower extremity injury, and Dr. Faerber found no objective evidence to determine that such an injury had occurred.

Dr. Faerber also examined Claimant to determine whether there was any irritation of the sciatic nerve and found none. Dr. Faerber discussed Claimant's left knee and the strain that Claimant experienced. Dr. Faerber found that Claimant showed tenderness in the an area that appeared normal on the MRI. Otherwise, Dr. Faerber found nothing significant. Dr. Faerber found no evidence of a meniscal tear not any ligament instability. Dr. Faerber testified that Claimant did not complain of pain traveling from the back to the hips. Dr. Faerber documented the pain to be described as being in the knee and ankle and radiated up toward the hip. Claimant made this complaint once.

On Claimant's last visit to Dr. Faerber, Dr. Faerber found some tenderness over the anterior talofibular ligament and no significant instability. Dr. Faerber's x-ray of the right ankle was completely normal. At the time of Dr. Faerber's last examination of Claimant, Claimant's condition was not permanent and stationary. Dr. Faerber explained that Claimant continued to have subjective complaints of pain. Dr. Faerber felt that with continued strengthening and exercise, that the subjective complaints would resolve in approximately 6 to 8 weeks.

Attached to Dr. Faerber's deposition testimony was a workers' compensation patient history form that was completed by Claimant at the time of Dr. Faerber's examination. When asked about the areas of the body affected by the injury, Claimant completed the form to say "ankle and knee left." Nowhere on the form does Claimant make mention of the back injury.

A MRI report, dated August 8, 2000 is included in the record in this claim. (RX 5). The MRI found an "oval-shaped ill-defined abnormality in the distal medial femoral metadiaphysis with involvement of both the cortex and the medullary cavity." The report also indicates that Claimant's menisci show Grade II degenerative changes. Claimant's anterior cruciate ligament, posterior cruciate ligament,

lateral collateral ligament, and medially collateral ligament are all intact. The MRI report indicates that Claimant has an abnormality of the left distal medial femoral metadiaphysis and no meniscal tear.

The records of H.R. Sullivan are also included as part of Respondent's exhibits. (RX 6). The records span a time period of May 16, 2000 through July 24, 2000. Over this time period, various work limitations are imposed. However, the only affected areas discussed are the left knee and the left ankle.

Non-medical Evidence

Included in the record in this claim is Claimant's choice of physician form completed on July 24, 2000 by Claimant. (RX 7). The form selects Dr. Wade Faerber as the treating physician. Also included in the exhibit is the list that was given to Claimant when he made his choice of physician. The top of the form bears the following language.

> The following information is provided for you (sic) convenience. You are not obligated to select any of the listed physicians for treatment. Other physicians are listed under the specific medical need in your local phone book.
>
> This list is distributed strictly for your convenience and lists some of the doctors practicing in the commuting area. Please feel free to call any of the physicians on this list and ask all the questions you may have regarding practices.
>
> Remember, this list is provided strictly for your convenience. The choice is yours and yours alone.

Also included in the record is a letter from Claimant's counsel dated September 11, 2000 addressed to Contract Claims Services. The letter requests that Claimant be permitted to be evaluated by Dr. Sidney Levine. (RX 8). Claimant was notified, via letter dated July 25, 2000, that modified light work duty was available for him with Respondent. (RX 9). Additionally, there is an offer of work from Respondent, dated December 8, 2000. (RX 10). This letter notified Claimant that while Dr. Levine is not being recognized as Claimant's treating physician, that Respondent has determined that it is in Claimant's best interests for Respondent to meet Dr. Levine's work limitations. Therefore, Respondent scheduled Claimant to return to work on December 11, 2000 and expected Claimant to comply with Dr. Levine's limitations.

Additionally, Respondent includes Claimant's wage statements for the 52 weeks worked from 1999 through 2000. (RX 11). Respondent's first report of injury is included as a part of this claim. (RX 12). The report indicates that the injury was suffered on May 15, 2000 and that the body parts

injured include the left ankle and left knee. Respondent has also submitted Claimant's claim for benefits filed September 11, 2000. (RX 13). This filing notes that the injury suffered by Claimant involved the "left knee and ankle with back pain from altered gait." Claimant also alleges that he was not provided with a free choice of treating physician.

Respondent controverted the claim on September 20, 2000. (RX 14). Respondent filed an additional controversion on April 24, 2001. (RX 14). Also included is the Notice of Final Payment or Suspension of Compensation Benefits dated June 12, 2000. (RX 15). This form indicates that Claimant's average weekly wage is $395.15. The benefits were terminated because Claimant returned to work. Claimant was paid at total of $112.89 for 3 days off of work from May 19, 2000 through May 21, 2000.

Claimant's deposition testimony, dated May 7, 2001 is submitted to challenge Claimant's veracity as a witness. (RX 17). Claimant testified that he attended Santa Barbara City College, graduating in 1984, with an Associate of Science Degree in Administration of Justice. Claimant also testified that at one time, he possessed a real estate license, but that the license certification had lapsed.

Claimant stated that he engaged in an apprenticeship in the construction trades, but not with any specific entity. Claimant testified that he has been working in the construction arena since the 1970s, mostly with friends in carpentry, concrete, and masonry. Claimant is also self-taught in computers and would consider himself proficient. Claimant also stated that he possesses a commercial drivers' license.

Claimant then recounted his work history. Claimant had worked as a painter, cross country commercial vehicle driver, concrete laborer, lumber and building materials, maintenance person, landscaper, custodian, framer, and roofer. Claimant began working for Respondent in November, 1999 as a painter, maintenance person, and carpenter. Claimant's job duties included repairing and rebuilding old buildings, concrete, framing, and painting. Claimant worked and continues to work 40 hours per week at a rate of $10.31 per hour. Claimant continues to be employed by Respondent.

Claimant stated that he has been out of work since December 12, 2000 because of the May 15, 2000 injury. Claimant stated further that he ceased working for Respondent in his limited duty position because Respondent violated the limitations placed on Claimant on several occasions, but that the pain he was experiencing was the main reason for ceasing to work. Claimant testified that he has not been paid during this time period except for the time that he actually worked. Claimant further testified that he was injured while working for Respondent. Claimant recounted the details of the accident on May 15, 2000.

Claimant stated that he sustained an injury to his back and hips. Claimant stated further that the pain travels down his legs and into his feet. Claimant also stated that both knees pop, that both ankles pop, and that the popping is more prevalent in the right than in the left ankle. Claimant testified that he has pain in both the front and back of both legs, and tightness in the hamstrings and calves. Claimant

also experiences numbness in his left foot and in the right foot when sleeping. Claimant does not experience numbness or tingling in his thighs, but does have both of those sensations in his calves.

Claimant stated that his left knee is more painful than the right and that the knees hurt, as well as the hips. Claimant testified that these pains are constant. Claimant described the pain as traveling from his back into his knees and into his heels and ankles. Claimant characterized the pain as burning, and sometimes throbbing. Walking, Claimant states, makes the pain worse immediately.

Claimant testified that he twisted his knee and ankle at the time of the injury on May 15, 2000. When discussing his knee and ankle, Claimant stated that the throbbing pain was located more in his back and on the sides of the knee and ankle. Claimant stated that when he experiences back and hip pain, that the pain radiates down the legs into the knees. Claimant also discussed his ankle pain. Claimant said that the throbbing pain is located on both in the inside and the outside of the ankles and affects both heels.

Claimant's right foot experiences throbbing, sometimes burning, pain and numbness in the heel. Claimant also stated that all of his toes become numb and that heel numbness usually accompanies toe numbness. This occurs most often when Claimant is sleeping or when Claimant's legs are crossed. Claimant stated that his left foot becomes numb all the way up to the knee, and that he experiences numbness in his entire leg. Claimant described his hip pain as constant, and being the most painful area at the time of the deposition. Claimant stated that the pain travels from the lower back into the buttocks, and then up the sides of the hips and then down the front of his legs.

Claimant's back pain occurs most often approximately a couple of inches above the belt line. After the injury, Claimant sought medical attention and was taken off of work for 3 days, and then was placed on "desk duty" for one week. At that point, Claimant believed that his condition was improving. Claimant stated that he returned to work in late July and began to notice back pain and pain in the lower extremities. Claimant then contacted Maria Lanzziano.

Claimant testified that Ms. Lanzziano set up an appointment for him and provided him with a list of physicians to choose from. Claimant stated that he asked for a telephone book and was told "No. Go ahead and choose off of the list. It's for your convenience." Claimant agreed and chose Dr. Faerber. Claimant testified that he did not understand the language printed at the top of the list that states that choosing off of the list is not mandatory because Claimant states that he was told that if he did not choose a doctor from the list that he would not receive treatment.

Claimant then stated that he reported the left knee and left ankle injuries to Mr. Sullivan. Claimant stated that he reported back pain in addition to the left knee and left ankle pain to Dr. Faerber. Claimant stated further that he told Dr. Faerber of this back pain on each successive visit. Claimant testified that his back symptoms became increasingly worse after he first saw Dr. Faerber. Claimant thought at that time that the physical therapy for his ankle was aggravating his back condition.

Claimant stated that he reported the increase in back symptoms to Dr. Faerber. Claimant felt that Dr. Faerber was not treating Claimant's back condition and "wouldn't even talk about it." Claimant testified that he did not seek permission from Respondent to change treatment to a different physician. Instead, Claimant hired an attorney and went to see Dr. Bernicker. Claimant testified that he reported pain in his back and knees to Dr. Bernicker and that the pain traveling from his back into his legs began in late July, 2000.

Claimant went on to explain that "the only time I ever had back problems is after a heavy day of lifting." Claimant testified that he was always able to "shake it off." Claimant characterized the previous back pain as stiffness after completing hard work, but never sought treatment for the pain.

Claimant's Evidence[3]

Medical Evidence

Dr. Jeffrey Bernicker authored a "Report of Primary Treating Physician" on September 13, 2000 pertaining to Claimant. (CX 4). Dr. Bernicker is board certified in orthopedic surgery. (CX 14). In rendering this opinion, Dr. Bernicker reviewed Claimant's medical records. Dr. Bernicker also listed Claimant's job duties as a painter, general maintenance person, and carpenter to include: standing, walking, bending, twisting, reaching, lifting, squatting, kneeling, climbing, pushing, pulling, crawling, and overhead work. Claimant presented with complaints of low back pain, left knee pain, and left ankle pain. Claimant recounted to Dr. Bernicker how the injuries occurred and told Dr. Bernicker that he had immediate onset of back pain at the time of the accident.

Dr. Bernicker then documented all of Claimant's symptoms. Dr. Bernicker noted that Claimant was experiencing constant pain in his back, that the pain radiates into both legs, and the pain increases with bending, coughing, sneezing, pushing, pulling, sitting 20 minutes, standing 20 minutes, and walking 10 minutes. Dr. Bernicker also noted that Claimant did not experience numbness or tingling associated with the pain. Pertaining to Claimant's left knee, Claimant stated that he was experiencing intermittent pain that radiated up into his hips and low back and down into the ankle.

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[3] Claimant submitted several exhibits that duplicate those submitted by Respondent. CX 1 is the same as RX 12; CX 2 is the same as RX 14; CX 5 is the same as RX 7 & 8; CX 8 is the same as RX 5; CX 12 is the same as RX 6; CX 13 is the same as RX 4. As these exhibits are duplicates of those submitted by Respondent and have been discussed previously, they will not be discussed separately in this section of the Decision and Order. Additionally, CX 3 was argued by Claimant's attorney to relevant only to the issue of attorney fees. Considering that no petition for attorney's fees was received, this particular piece of evidence will not be discussed, nor shall it be considered in rendering a decision in this claim.

Additionally, Claimant stated that he was experiencing popping and grinding in the left knee as well as limited range of motion and swelling. Claimant stated that the left knee pain increased with squatting, kneeling, crawling, climbing and descending stairs, walking 10 minutes and standing 20 minutes. Claimant also felt that the knee was unstable although he had never experienced any collapsing.

Claimant also related to Dr. Bernicker the symptoms that he was experiencing in his left ankle. Claimant stated that he feels intermittent pain that radiates down into his foot and up into the Achilles tendon area. Claimant also experiences popping and grinding in the left ankle. Claimant also complained of limited range of motion and swelling in the left ankle. Claimant's pain increases with squatting, kneeling, crawling, ascending and descending stairs, walking 10 minutes, and standing 20 minutes. Claimant also has a sensation of instability in the left ankle.

Dr. Bernicker reviewed several outside x-rays and an MRI dated August 8, 2000. The August 8, 2000 MRI was interpreted to show signs of degenerative changes of the medial and lateral menisci with no obvious tears. An August 28, 2000 x-ray showed no signs of any significant abnormality in the knee. Dr. Bernicker also conducted a x-ray on the date of the examination of Claimant's lumbosacral spine. Dr. Bernicker interpreted this x-ray to show "advanced L5-S1 degenerative disc disease with almost complete loss of disc height and anterior osteophyte formation with abundant sclerosis and facet hypertrophy."

A x-ray of Claimant's left ankle was also performed on September 13, 2000. This x-ray was interpreted by Dr. Bernicker to exhibit no obvious fractures or dislocations. The left knee x-ray performed on September 13, 2000 showed a medially based lesion. Dr. Bernicker also reviewed multiple records in connection with rendering his opinion in this claim.

Dr. Bernicker conducted a physical examination of Claimant's back and lower extremity. Dr. Bernicker found no apparent guarding, and that Claimant is able to freely change position from sitting to standing to supine. Dr. Bernicker also found Claimant's heel-toe gait to be well preserved. Minimal tenderness and spasm were observed in the paralumbar region, and Claimant exhibited some discomfort with flexion, extension, and rotation. The range of motion in Claimant's back was full and equal in both hips, and Claimant's patellar and Achilles reflexes were normal and symmetrically equal.

Dr. Bernicker also conducted a physical examination involving Claimant's left knee and left ankle. Dr. Bernicker found Claimant's left knee to show no effusion, no instability to varus or valgus stress, and no obvious detectable masses surrounding the knee. The McMurray test, the Lachman test, the shift test, and the anterior and posterior drawer tests produced negative results. Dr. Bernicker did note mild patellofemoral crepitus and tenderness of the medial and lateral joint lines on Claimant's knee. Dr. Bernicker's left ankle examination showed no surrounding effusion, nor any ankle instability to anterior drawer, and no swelling. Dr. Bernicker found "point tenderness over the medial ankle on the deltoid and lateral ankle along the ATFL and CFL."

These findings left Dr. Bernicker with the impression that Claimant had suffered a left ankle and a left knee sprain, a left knee non-industrial lesion, and "a lumbosacral strain with underlying degenerative disc disease." Dr. Bernicker released Claimant to work on light duty with the limitations of no lifting over 10 pounds, and none of the following repetitive activities: kneeling; stair or ladder climbing; pushing or pulling; prolonged walking, standing or sitting; squatting or stooping. Dr. Bernicker determined that if no limited duty were available, Claimant should be considered temporarily totally disabled.

Dr. Bernicker attributed Claimant's knee, ankle, and lumbar spine pain to Claimant's May 15, 2000 accident while employed as a carpenter for Respondent. Dr. Bernicker did not attribute any of Claimant's symptomology to non-industrial causes, natural progression of an underlying disease process, or any prior industrial injury in Claimant's back or ankle. Dr. Bernicker also found that no apportionment need be made for natural progression of any underlying lumbar spine disease. Dr. Bernicker also found that Claimant's left knee lesion to be non-industrial in nature.

As of November 7, 2000, Dr. Bernicker determined that Claimant was temporarily totally disabled from his usual employment if no light duty work were available. Dr. Bernicker restricted Claimant to no lifting over 10 pounds, and no repetitive kneeling, stair or ladder climbing, pushing or pulling, prolonged walking or standing or sitting, squatting, or stooping. On December 5, 2000, Dr. Bernicker found Claimant to be temporarily totally disabled if no light work duty were available and placed the same restrictions on Claimant. December 12, 2000, Dr. Bernicker noted that Claimant had worsened since the last examination. Additionally, on February 27, 2001, Dr. Bernicker found Claimant to be totally disabled from resuming his usual and customary employment. As of April 10, 2001, Claimant was determined to be totally disabled by Dr. Bernicker.

Dr. Bernicker issued an additional report on May 14, 2001. (CX 16). In this report, Dr. Bernicker reviewed the report of Dr. Greenfield, dated April 4, 2001. Dr. Bernicker disagreed with Dr. Greenfield regarding the industrial nature of Claimant's low back injury. Dr. Bernicker points out that prior to May 15, 2000, Claimant operated in the open labor market without any restriction. Dr. Bernicker also points out that Claimant reported an immediate onset of back pain to him at the time of the initial examination. Dr. Bernicker opines that Claimant's treatment was initially aimed at the left knee and left ankle.

Dr. Bernicker also stated that it is "not unusual for a worker to continue to working in usual and customary occupation, hoping that the injury will resolve." Dr. Bernicker opined that "for Dr. Greenfield to discount [Claimant's] symptoms in the face of his ability to continue working is, in my opinion, not valid." Dr. Bernicker points out that Dr. Greenfield noted that Claimant continued to experience low back pain for 4 to 6 weeks after the injury.

Dr. Bernicker found that when dealing with a work related injury that involves more than one body part, it is not uncommon for attention to be first focused on the areas that are most problematic.

Dr. Bernicker opined that, because of this phenomenon, the "lack of complete work up to [Claimant's] lumbar spine does not discredit the significance of symptoms [Claimant] continued to experience, nor should it restrict [Claimant's] ability to receive treatment to the lumbar spine."

Dr. Bernicker found Claimant's report of the circumstances surrounding the accident is consistent with a straining injury to the lumbar spine "which, superimposed on a degenerative disc problem, could account for the current level of lumbar symptomology radiating into lower extremities." Dr. Bernicker believes that Claimant deserves to receive treatment for his lumbar spine injury on an industrial basis.

Dr. Bernicker was deposed in connection with this claim on July 19, 2001. (CX 17). Dr. Bernicker testified that he first examined Claimant in September, 2000 with 8 follow up appointments. At Dr. Bernicker's initial evaluation, Claimant "complained of left knee, left ankle, and low back pain radiating through the left lower extremity." Dr. Bernicker also noted that Claimant stated that the pain radiated into both lower extremities. Dr. Bernicker went on to state that since the time of the initial evaluation, Claimant's left ankle symptoms have lessened, but Claimant's low back, left leg, and left knee have remained problematic. Dr. Bernicker explained that initially a patient's history is taken by a medical record historian, but that history is then reviewed by Dr. Bernicker with the patient at the time of the examination.

Dr. Bernicker noted that Claimant presented to him with the knowledge of the existence of the lesion in the left knee. Dr. Bernicker opined that Dr. Faerber was likely most concerned with the lesion because a tumor has the potential to be life threatening. Dr. Bernicker testified that Claimant presented to him at the initial visit with low back pain, that according to Claimant, had received no treatment or attention from other care providers.

During the initial physical examination, Dr. Bernicker examined Claimant's back with the straight leg test administered in both the sitting and supine position. Both tests produced negative results. Dr. Bernicker explained that the straight leg tests are designed to "show potential disorder in the sciatic nerve," and if the tests produce positive results, potential lumbar disk disease is indicated. Dr. Bernicker pointed out that a negative result does not necessarily indicate that Claimant has no process occurring in the lumbar spine. Dr. Bernicker's ankle jerk test also produced normal results. Dr. Bernicker also noted that Claimant's gait was normal at this time.

Dr. Bernicker testified that he ordered a MRI study to be performed on Claimant because Dr. Bernicker had observed degenerative disease in Claimant's lower lumbar spine by radiograph. Dr. Bernicker stated that he is concerned about potential disk abnormality because Claimant's "clinical picture is consistent with potential radicular type pain radiating from the lumbar spine into the leg based on [Claimant's] history." Dr. Bernicker also stated that the MRI was indicated because Claimant had consistent reports of symptomology in his back radiating into the legs in the 6 visits between the initial visit and the visit when Dr. Bernicker ordered the MRI.

Dr. Bernicker explained that an acute traumatic lumbosacral injury requires time for the symptoms of the injury to manifest. Dr. Bernicker stated that the amount of time required for the symptoms to manifest depends on the other parts of the body that were involved in the injury. Dr. Bernicker explained further that it is not unusual for there to be a delay in the appearance of the symptoms. Dr. Bernicker's experience is that the symptoms can appear anywhere between 8 to 16 weeks after the date of the injury.

Dr. Bernicker testified that Claimant did not have atrophy in either of his lower extremities, nor any sensory changes in the lateral aspects of either of his feet. Claimant also does not exhibit stocking sensory deficit.

Dr. Bernicker reiterated that Claimant reported immediate onset of pain in his left knee, left ankle, and low back related to the May 15, 2000 injury at the time of the initial visit. Dr. Bernicker believes that Claimant sustained a straining injury to his lumbar spine on the date of the accident. Dr. Bernicker believes, based on Claimant's recitation of the events surrounding the May 15, 2000 accident, that the accident was sufficient to cause the low back symptoms.

Dr. Bernicker found that Claimant's lumbar spine exhibited longstanding changes. Dr. Bernicker noted that Claimant did not have any pre-existing injuries to the lumbar spine. Dr. Bernicker opined that Claimant is in need of treatment for the low back injury sustained on May 15, 2000. Dr. Bernicker noted that Claimant was limping due to either Claimant's knee or ankle. Dr. Bernicker determined that the antalgic limp contributed to aggravating Claimant's back complaints.

Dr. Bernicker went on to discuss Claimant's left knee. Dr. Bernicker noted that Claimant has had consistent symptoms in the left knee and changes in the MRI that indicate changes in the menisci. Dr. Bernicker recommended that he be permitted to make a trial of corticosteroid injection. Dr. Bernicker went on to state that if the injection failed to offer relief for the symptoms, Claimant may be a candidate for "arthroscopy with debridement." Dr. Bernicker reiterated that Claimant's left knee lesion and any potential meniscal changes are not related.

Dr. Bernicker also discussed Claimant's need for back treatment. Dr. Bernicker advocated the initiation of physical therapy with anti-inflammatory medications. Dr. Bernicker does not expect that Claimant's condition will improve without treatment. Dr. Bernicker believes that Claimant's back condition "previously asymptomatic, sustained an industrial injury with a mechanism consistent with lumbar strain." Dr. Bernicker went on to opine that Claimant's back symptoms are directly related to the May 15, 2000 accident.

Dr. Bernicker testified that the MRI confirmed multi-level disk degeneration. Dr. Bernicker found that the L5-S1 disc level was involved with a large disc profusion impacting the S1 nerve root which "can certainly support the history of radiating symptoms into the left lower extremity." The disability questionnaire completed by Claimant at the time of his examination by Dr. Bernicker notes

that Claimant was experiencing "left ankle, knee, and lower back" pain at the time of the initial examination.

Dr. Bernicker authored a supplemental report on July 30, 2001. (CX 18). Dr. Bernicker responds to Dr. Greenfield's July 24, 2001 report. Dr. Bernicker states that it remains his opinion "that [Claimant] has been truthful throughout his treatment course." Dr. Bernicker describes that Claimant

> suffered a straining injury to his lumbar spine, which, superimposed upon changes which [Dr. Bernicker] readily admits were preexisting in the lumbar spine combined to produce an acute exacerbation leading to symptoms radiating through the left hip and his lower extremity.

Dr. Bernicker went on to state that it is his opinion that Dr. Greenfield misinterpreted Dr. Bernicker's opinion. Dr. Bernicker explained that he did not advocate that Claimant's

> development of symptoms in the lumbar spine were a direct result of his altered gait. I have been clear that the straining injury resulting from a twisting of the left leg propagating force up through the lumbar spine sustained acutely at the time of injury was the biomechanical etiology for the development of lumbar symptomology.

(emphasis in original). Dr. Bernicker reiterated that he believes that Dr. Faerber was distracted from Claimant's back complaints because of the lesion in Claimant's left knee. Dr. Bernicker is of the opinion that Claimant's May 15, 2000 accident contributed "significantly to the development of symptoms in [the low back] and thus warrants treatment."

Dr. Luke Vaughn authored a report pertaining to Claimant's condition on March 27, 2001. (CX 15). Dr. Vaughn noted a history of left knee injury at the time of the examination. Claimant reported to Dr. Vaughn a higher level of activity related pain since the time of the previous visit, which was not noted. Dr. Vaughn found Claimant's gait to be slightly antalgic. A physical examination by Dr. Vaughn revealed no varus or valgus laxity, a negative Lachman's test, and minimal joint line tenderness. Additionally, the physical examination revealed tenderness of the medial femoral condyle and greater than lateral femoral condyle. Dr. Vaughn also noted no tenderness at the tibial plateau and normal sensation and motor function distally. Dr. Vaughn also reviewed a MRI that exhibited degenerative changes and a possible medial meniscal tear in the left knee.

A bone scan study of Claimant was performed on August 29, 2000. (CX 10). The impression of the scan was that there are no active bone changes shown and that there are degenerative changes present in the lumbosacral spine.

Non-medical Evidence

In support of his claim for benefits under the Act, Claimant submits several documents that do not pertain to the medical determinations in this claim. Claimant submits "chit cards" for sick time taken to attend physician and physical therapy appointments. (CX 6). Claimant also submits pay stubs for pay period #13 in 2000, that ends on June 17, 2000. Claimant entitles this pay stub "First Payroll Statement." (CX 7). Additionally, Claimant submits a pay stub for pay period #22 of 2000 that ended on October 21, 2000. (CX 7). Claimant designates this as the "Most recent payroll statement. Had a raise at six months. Started for MCCS on November 15, 1999." Claimant also submits receipts for prescription medications that were prescribed by Dr. Bernicker. (CX 9).

JURISDICTION

The parties have stipulated to the fact that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act, as incorporated in the Nonappropriated Fund Instrumentalities Act. I find this stipulation to be supported by the evidence of record. Therefore, I find that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act.

RESPONSIBLE EMPLOYER

Claimant's injury occurred while Claimant was employed by Marine Corps Exchange on May 15, 2000. Accordingly, Marine Corps Exchange is the properly designated responsible employer.

TIMELINESS OF NOTICE

An employee has 30 days to provide notice to the employer of injury or death. 33 U.S.C. § 912. The time limitation begins when reasonable diligence would have disclosed the relationship between the injury and the employment. 33 U.S.C. § 912(a). A presumption exists in favor of sufficient notice of the claim having been given. 33 U.S.C. §912(b). The parties have stipulated to the fact that Claimant provided timely notice to Respondent of the left knee and left ankle injuries. I find this stipulation to be supported by the evidence of record. Accordingly, I find that timely notice was provided as to the left knee and left ankle injuries.

TIMELINESS OF CLAIM

The timeliness of the claim must be considered. Claimant's timely filing of the claim was not challenged by Respondent. As such, I find that the claim was filed timely.

AVERAGE WEEKLY WAGE

The parties have stipulated to Claimant's average weekly wage. The parties agree that Claimant's average weekly wage is $408.40. (TR 4). This average weekly wage produces a compensation rate of $272.26. I find the stipulation as to the average weekly wage to be supported by the evidence of record. Therefore, I find that Claimant's average weekly wage is $408.40 for a compensation rate of $272.26.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Section 2(2) of the Act defines "injury" as:

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infections as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment

33 U.S.C. §902(2).

In determining whether an employee has sustained an injury compensable under the LHWCA, the judge must consider the relationship between Sections 2(2) and 20(a), the LHWCA's statutory presumption. The latter section provides "in the absence of substantial evidence to the contrary," it is presumed "that the claim comes within the provisions of the Act." 33 U.S.C. §920(a).

It is well-settled that the judge, in arriving at a decision in the claim, is entitled to determine the credibility of the witnesses, to weigh the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968); *Tood Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Inc.,* 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping,* 22 BRBS 87, 91 (1989); *Anderson v. Todd Shipyards Corp.,* 22 BRBS 20, 22 (1989); *Hughes v. Bethlehem Steel Corp.,* 17 BRBS 153 (1985); *Seaman v. Jacksonville Shipyards,* 14 BRBS 148 (1981); *Brandt v. Avondale Shipyards,* 8 BRBS 698 (1978); *Sargent v. Matson Terminals,* 8 BRBS 564 (1978).

At the outset, it further must be recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea,* 406 F.2d 521 (5th Cir.) *cert. denied,* 395 U.S. 921 (1969). Furthermore, it has been consistently held that the LHWCA must be construed liberally in favor of Claimant. *Voris v. Eiker,* 346 U.S. 328 (1953); *J.V. Vozzolo, Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967).

It is now well-settled that the presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J.Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir.) *cert. denied*, 429 U.S. 820 (1976). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Anderson*, 22 BRBS at 21; *Miranda v. Excavation Constr.*, 13 BRBS 882 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd* 620 F.2d 71 (5th Cir. 1980).

This statutory presumption, however, does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "prima facie" case. The Supreme Court of the United States has held that a "prima facie" claim for compensation, to which the statutory presumption refers, "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet Metal v. Director, OWCP*, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Indus./Fed. Sheet Metal*, 627 F.2d 455 (D.C. Cir. 1980).

Moreover, the existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Indus.*, 455 U.S. at 600. A claimant's theory as to how the injury occurred must go beyond "mere fancy." *Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982). The presumption, though, is applicable once a claimant establishes that he has sustained an injury, i.e. harm to his body. *Preziosi v. Controlled Indus.*, 22 BRBS 468, 470 (1989); *Brown v. Pacific Dry Dock*, 22 BRBS 284, 285 (1989); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only:

> (1) the claimant sustained physical harm or pain, and
>
> (2) an accident occurred in the course of employment, or conditions existed work, which could have caused the harm or pain.

Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); *Kelaita*, 13 BRBS at 330-31.

Once a prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980); *aff'g* 6 BRBS 607 (1977); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Hampton*, 24 BRBS at 144; *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *James v. Pate Stevedoring*

Co., 22 BRBS 271 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228, 231 (1987); *Keir*, 16 BRBS at 129.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1982). In such cases, the judge must weight all of the evidence relevant to the causation issue, resolving all doubts in the claimant's favor. *Sprague v. Director, OWCP*, 688 F.2d 862 (1st Cir. 1982); *Mac Donald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986).

The court in *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), interpreting the language of 33 U.S.C. § 902(2), concluded that if something goes wrong within the human frame, there has been an injury within the meaning of the LHWCA. In order for a claimant to avail himself of the Section 20(a) presumption, he must show that he sustained an injury, i.e. physical harm, and that an accident occurred or working conditions existed that could have caused the harm. *See Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981), *decision and order after remand*,17 BRBS 10 (1984), *aff'd*, 799 F.2d 1308 (9th Cir. 1986). Once the claimant establishes these elements of the prima facie case, the Section 20(a) presumption applies to link the harm with the claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the LHWCA. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989); *Johnson v. Ingalls Shipbuilding Div., Litton Sys.*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981).

The Board has consistently held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case for Section 20(a) invocation. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, the judge may properly rely on the claimant's statements to establish that he or she experienced a work-related harm, and where it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in the case.

The Board has consistently found that the presumption does not apply to the issue of whether a physical or psychological harm or injury occurred. *See Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15 91990); *Murphy v. SCA/Shayne Bros.*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979).

Claimant has sustained an "injury" where he has some harm or pain, or if "something unexpectedly goes wrong within the human frame." *Wheatey v. Adler*, 407 f.2d 307, 313 (D.C. Cir. 1968) (*en banc*). The claimant's burden does not, however, include establishing an injury as defined in Section 2(2) of the LHWCA. In *Kelaita*, the Board noted that to place such a burden on the claimant would be contrary to the well-established rule that the Section 20 presumption applies to the issue of whether an injury arose out of and in the course of employment. *Kelaita*, 13 BRBS at 329.

The judge can properly discredit the credibility of a claimant's testimony and conclude that the evidence fails to establish the occurrence of an injury. *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

In *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996), the Board upheld the ALJ's finding that Claimant failed to establish a prima facie case that he sustained a work-related injury based upon the judge's consideration of "inconsistencies in claimant's testimony regarding the date of his alleged accident, as well as claimant's failure to report the alleged incident to Dr. Grimes (two days later) . . . ."

In *Bolden*, Mr. Bolden complained of sustaining a back straining injury while employed with the respondent in that claim. Bolden waited one month to notify his employer of the work-related accident and the resulting injury. The administrative law judge found that the injury had never occurred and that as such, Bolden had failed to establish a prima facie case. In finding that the work-related injury did not occur, the judge cited Bolden's inconsistent testimony, Bolden's confusion over the date of the accident, and the fact that Bolden waited nearly one month to notify his employer of the accident and the resulting injury.

In *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988), Mr. Mackey alleged that he had suffered a work-related injury that affected his right eye. Claimant alleged that a piece of plastic struck him in the right eye. The administrative law judge found that Mackey's body had not been touched by the plastic. The judge based this finding on the fact that there were no eyewitnesses to the accident and that the finding of an injury was based only on Mackey's subjective complaints. The judge did not find Mackey to be credible based on Mackey's demeanor and the contradictions in Mackey's statements. The judge also cited that Mackey had reported different symptoms to different physicians, the location of the pain varied between reports, and Mackey's accounts of the time and manner in which the accident occurred varied by report.

The Board found on appeal, that the claim turned on Mackey's veracity and the administrative law judge found that Mackey had no credibility as a witness. Additionally, the administrative law judge's decision was supported by the fact that the physicians of record found that even if Mackey had suffered an injury, that none of the physicians found a resulting disability. However, the administrative law judge found that none of the medical reports had any objective evidence of any injury and that the only evidence of the injury was Mackey's subjective complaints.

Like the court in *Mackey*, whether a low back injury occurred on May 15, 2000 is dependent on Claimant's credibility. I find Claimant's testimony regarding the alleged low back injury not credible. Claimant's description of his symptoms has changed over the course of this litigation. On the first report of injury completed by Ms. Lanzziano on May 18, 2000, Claimant's injuries were listed to include the left ankle and left knee. Ms. Lanzziano supports the conclusion that Claimant never reported the back injury to her by the fact that the injury was not reported to Contract Claims Services, as she is required to do. (TR 84-85). Claimant was seen by Dr. Faerber between August 3, 2000 and September 15, 2000.

Dr. Faerber indicated that Claimant presented to him with left knee and left ankle pain. Dr. Faerber, at the time of his deposition, stated that Claimant had never reported any back pain to him. (RX 18). Claimant attributes this to the fact that Dr. Faerber simply ignored his complaints regarding his back. (TR 25). I find this explanation less than persuasive. Claimant himself did not list back pain as one of his complaints on the history form provided by Dr. Faerber. If Claimant had been experiencing such pain, then it would expected that Claimant would have listed this pain as requiring treatment.

At the time of the hearing in this matter, Claimant stated that he was experiencing pain in only his ankle and knee at the time that he was seen by Nurse Sullivan. (TR 23). Claimant went on to state that he accurately reported his symptoms to Dr. Bernicker at his initial visit. (TR 31). Claimant related to Dr. Bernicker that he experienced immediate onset of back pain at the time of the May 15, 2000 accident. (TR 57).

Claimant then testified that he "thought" that he had injured his back on May 15, 2000, but that he "really first started feeling it come on ... [in] late June early July." (TR 45-46). However, at the time of Claimant's deposition testimony on May 7, 2001, Claimant stated that he had experienced an injury to his back and hips. (RX 17). Claimant described the pain as it related to his back, hips, knee, ankles, and feet. Claimant then stated in his deposition testimony that he reported the back injury to Dr. Faerber and that the pain had begun in late July.

Claimant reported to Dr. Bernicker in September, 2001 that he had immediate onset of back pain on the date of the accident. (CX 14). Claimant also reported to Dr. Greenfield that he had immediate onset of back pain on the date of the accident. (RX 1). However, Dr. Greenfield accurately points out that there is no notation of any back pain until approximately 4 to 6 weeks after the date of the accident. I agree with Dr. Greenfield that it is "medically improbable" that none of the care givers that tended to Claimant's condition noted Claimant's complaints of back pain.

Additionally, Claimant stated on his claim for benefits dated September 11, 2000, that he was seeking benefits for his "left knee and ankle with back pain from altered gait." Dr. Bernicker, in his supplemental report, stated that Claimant's back sustained a traumatic injury on May 15, 2000. This is another inconsistency in Claimant's story. If Claimant had sustained the injury as a result of the May

15, 2000 accident, Claimant would not have alleged on the form that the injury occurred because of altered gait.

Based on the evidence of record, the credibility of the witnesses, and the physician reports contained in the record, I find that Claimant's testimony regarding his low back injury entitled to very little weight. Claimant's story surrounding when the back pain began and whether he had reported the pain to the treating medical professionals is simply not believable. Claimant consistently alters the dates and times when he began to feel the onset of back pain. Additionally, I find it unlikely that Dr. Faerber would have completely ignored Claimant's concerns regarding the back pain. Therefore, I find Claimant did not sustain a low back injury occurred on May 15, 2000.[4]

However, this finding does not dispense with the other injuries that Claimant suffered on May 15, 2000. By all accounts, Claimant suffered an injury to his left knee and an injury to his right ankle on the date of the accident. Therefore, I find that Claimant suffered injuries to the left knee and the left ankle on May 15, 2000.

Claimant must establish that the left knee and left ankles injuries arose out of and in the course of his employment. As far as can be deciphered from the pleadings and writing arguments submitted in this claim, no party is contesting this fact. Therefore, I find that the left knee and left ankle injuries that occurred on May 15, 2000 arose out of and in the course of Claimant's employment with Respondent.

NATURE AND EXTENT OF DISABILITY

The first issue to determine with respect to the nature and extent of Claimant's disability is whether the injury is temporary or permanent. A finding that a disability is permanent has several effects. First, in the case of total disability, it allows the addition of a cost of living increase to the Claimant's benefits. *See* 33 U.S.C. § 910(f). Second, only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under Section 8(f) of the Act. *See* 33 U.S.C. § 908(f). Third, a Claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985).

The date on which a Claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16

[4] This finding is supported by the fact that the only evidence in support of the fact that a low back injury occurred on May 15, 2000 is Claimant's subjective complaints. There is no objective evidence contained in the record to support Claimant's allegation of a low back injury.

BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

There is divergence between the parties as to whether Claimant has reached maximum medical improvement. However, in Claimant's post-hearing submission, Claimant makes no allegation that any body part, other than Claimant's back, has not reached maximum medical improvement. Therefore, I have reviewed the medical opinion evidence to determine if Claimant's left knee and left ankle have reached maximum medical improvement.

Claimant's left ankle was injured as a result of the May 15, 2000 accident. All of the physicians of record determined that Claimant suffered a sprained ankle as a result of the accident. It does not appear that any of the physicians advocate that Claimant has not reached maximum medical improvement with regard to Claimant's left ankle. From what this Court is able to decipher as to Claimant's left ankle, the injury should have healed within 6 weeks of the accident. (TR 106-107, RX 4). Dr. Faerber treated Claimant for the left ankle injury and determined that the injury should have resolved within 6 to 8 weeks of September 15, 2000. (RX 4). Dr. Faerber determined that Claimant continued to experience subjective complaints of pain, even when the x-ray revealed normal results. Therefore, from the evidence submitted, I have determined that Claimant's left ankle has reached maximum medical improvement as of December 1, 2000.[5]

Claimant's left knee presents a slightly different assessment. Dr. Greenfield determined that Claimant's left knee showed no pathological process on MRI and the MRI also revealed a normal knee for a 48 year old male. Dr. Greenfield found that Claimant sustained a spraining injury on the date of the accident and that the sprain had resolved by the time of Dr. Greenfield's examination of Claimant on March 14, 2001. (TR 108-12, RX 1). Dr. Greenfield determined that Claimant continuing to experience pain nearly 10 months after the accident makes "no sense, whatsoever." (TR 114). Dr. Faerber, who initially treated Claimant for the left knee injury, found that, as with Claimant's left ankle, the left knee should have completed the healing process within 6 to 8 weeks of Dr. Faerber's final examination of Claimant on September 15, 2000. (RX 4).

Dr. Bernicker finds no objective evidence of a continuing injury to Claimant's left knee. Claimant reports subjective complaints of continuing pain in the left knee. The only finding Dr. Bernicker makes regarding Claimant's left knee is that it exhibits "tenderness." (CX 4). Dr. Bernicker determined that based on Claimant's subjective complaints of pain, that further treatment is necessary for Claimant's left knee. I find Dr. Bernicker's assessment unpersuasive. All of the x-rays of Claimant's left knee and the MRI show that Claimant did not suffer a meniscal tear and that there is no

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[5] I have determined this date by taking the most liberal assessment of when Claimant's left ankle should have healed.

evidence of any traumatic injury to the knee. Therefore, considering that Claimant suffered a spraining injury on May 15, 2000, I find that Claimant's left knee has reached maximum medical improvement as of December 1, 2000.[6]

Dr. Greenfield found that Claimant's left knee and left ankle conditions had completely resolved and that no permanent residual disability exists. (RX 1). Dr. Faerber does not address the issue of disability, but based on Dr. Faerber's assessment that Claimant's condition would completely heal within 6 to 8 weeks, it can be assumed that Dr. Faerber meant that no residual permanent disability would exist. (RX 4). Dr. Bernicker bases the fact that Claimant continues to experience a disability on Claimant's subjective complaints. As I have found that Claimant lacks credibility regarding the extent of his injuries, I find Dr. Bernicker's assessment to be entitled to less weight. Therefore, I find that Claimant suffers from no permanent disability as a result of the May 15, 2000 accident.

Section 8(e) of the LHWCA provides:

> Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

33 U.S.C. § 8(e).

Even if an employee suffers a scheduled injury, if the employee has not reached maximum medical improvement and continues to be employed but has sustained a loss of wage-earning capacity, the employee is entitled to temporary partial disability benefits based on such loss. *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791 (1978), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F2d 986 (4th Cir. 1979).

As an initial matter, Claimant's average weekly wage has been determined to be $408.40. The only evidence submitted to determine Claimant's wage earning capacity after the injury is a payroll stub for pay period number 22 of 2000. (CX 7). This payroll stub indicates that Claimant earned a gross amount of $763.42. This amounts to a post-injury weekly wage of $381.71.

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[6] I have determined this date in the same way that I determined the date of maximum medical improvement in Claimant's left ankle.

Claimant is entitled to temporary partial disability payments for the time in which he was temporarily disabled. Claimant reached maximum medical improvement with regard to his left knee and left ankle on December 1, 2000. Claimant was paid for the 3 days after the injury that he was unable to attend work.[7] Additionally, there was no light duty work available for Claimant until July 25, 2000. (EX 9). Therefore, Claimant is entitled to temporary total disability benefits, because of the lack of light duty work, for the time period of May 16, 2000 through July 25, 2000. On July 25, 2000, light duty work was made available to Claimant. Therefore, as of that date Claimant is entitled to temporary partial disability benefits for the time period of July 26, 2000 through November 30, 2000.[8] Claimant had lost earning capacity during that time due to the left knee and left ankle injuries. However, Claimant was able to continue to work in a modified duty status

CLAIMANT'S FREE CHOICE OF PHYSICIAN

Claimant has the right to choose an attending physician to provide the required medical care. Claimant's right to select his own physician is well-settled, pursuant to Section 7(b). 20 C.F.R. § 702.403; *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). An injured worker is entitled to all reasonable and necessary medical care and treatment "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532- 539 (1979).

> An employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

33 U.S.C. § 907(c)(2).

It is Claimant's contention that Dr. Bernicker is his free choice of physician. Claimant alleges that he was not afforded a free choice of physician because he was told that unless he chose a physician

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[7] Employer shall receive a credit for compensation benefits paid to Claimant for the 3 days after the injury.

[8] Whether or not Claimant chose to work in the light duty status is irrelevant. The work was made available considering the restrictions placed on Claimant by Dr. Levine. Claimant's choice not to work has no bearing on this determination.

from the list provided by Respondent, that Claimant would not receive treatment. I find Claimant's assertion that he was told that he must chose from the list provided unpersuasive.

Claimant testified at the time of the hearing in this matter that he reported to Ms. Lanzziano's office seeking further medical assistance. Claimant stated that Ms. Lanzziano informed Claimant that he was required to choose a physician from the list provided. (TR 35). Claimant later recalled that he actually chose a Dr. Joel Heiser initially as his treating physician. (TR 53).

Ms. Lanzziano testified that Claimant first designated the facility in which Nurse Sullivan works as his treating facility. (TR 76 & 93). Later, Claimant returned to Ms. Lanzziano's office to request the authority to see an orthopedic surgeon. (TR 77). Claimant's request was granted and Claimant designated Dr. Heiser as the treating physician. (TR 77). Ms. Lanzziano testified that at no time did she indicate to Claimant that he was required to be seen by any physician on the list. (TR 78). Ms. Lanzziano testified further that Claimant was informed that the list was provided merely as a convenience. (TR 78). Ms. Lanzziano stated that Claimant returned to the office 3 days later stating that he was unable to schedule an appointment with Dr. Heiser. (TR 79). At that time, Ms. Lanzziano was not present and her assistant aided Claimant. (TR 79).

Claimant mischaracterizes Ms. Lanzziano's testimony in his post-hearing submission. In that submission, Claimant alleges that "Ms. Lanzziano's testimony was that she was on vacation and she did not know what was said to Mr. Parker in response to his inquiry as to how to get to a doctor instead of being seen by the physician's assistant, Mr. Sullivan." *See* Claimant's Post Trial Brief, p. 9. This, in fact, is an inaccurate recitation of the facts.

Ms. Lanzziano testified that when Claimant first approached her regarding seeking medical attention from an orthopedic surgeon, that Ms. Lanzziano informed Claimant of his right to a free choice of physician. Claimant chose Dr. Heiser at that time to be the treating physician. Therefore, Ms. Lanzziano was aware of exactly what Claimant was told on that day. Claimant has testified that he was told by Ms. Lanzziano that he had to choose a physician from the provided list. As discussed above, I find Claimant's testimony entitled to less weight.

In addition to Ms. Lanzziano's testimony, Respondent's position is bolstered by the fact that the list of physicians that Claimant received included language specifically stating that Claimant was in no way required to choose a physician from the list provided. Additionally, I do not believe that Claimant was told by Ms. Lanzziano that he was required to chose a physician from the list provided. Therefore, I find that Claimant exercised his free choice of physician when he chose Dr. Heiser, and then again when he chose Dr. Faerber as his treating physician.

Under Section 7(b) and (c), the employer bears the burden of establishing that physicians who treated an injured worker were not authorized to provide treatment under the LHWCA. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer has met this burden. As this Court has already determined, Claimant has fully recovered from the work-related injuries suffered on May 15, 2000. Therefore, no further treatment is necessary. As such, Claimant has not been denied or refused treatment by Respondent. Claimant's request to receive treatment from Dr. Bernicker as a result of the alleged back injury on May 15, 2000 is denied as no such work-related injury occurred.[9]

While I make the finding that Claimant exercised his free choice of physician in choosing Dr. Faerber to treat his orthopedic needs, it is not within the province of this Court to order a change in treating physician. In *Jackson v. Universal Maritime Corp.*, 31 BRBS 103 (1997), the Board held that the district director, and not the ALJ, has the authority to change a claimant's physician. Because this determination by the district director is purely discretionary, it is reviewable on direct appeal to the Board under an "abuse of discretion" standard. Therefore, the claimant in *Jackson*, was not entitled to a hearing before the ALJ to resolve a factual dispute regarding the change.

The holding in *Jackson*, is not applicable to Claimant, however, because this Court has determined that Claimant exercised a free choice in selecting his treating physician, in addition to the fact that Claimant is in no need of further medical treatment for the accident of May 15, 2000, therefore, no change in the designation of the treating physician is needed.

INTEREST

Although the Act does not provide for interest to be paid on past due benefits, the courts and the Administrative Review Board have upheld interest awards as consistent with the Congressional purpose of making claimants whole for their injuries. *Watkins v. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 594 F.2d 986, 987 (4th Cir. 1979). A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins*, 594 F.2d at 989. The rate of interest to be computed is the rate used by the United States District Courts under 28 U.S.C. § 1961 (1982).

Interest is mandatory and cannot be waived in a contested claim. *Byrum v. Newport News Shipbuilding & Dry Dock Co.,* 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.,* 10 BRBS 734 (1978). The Administrative Review Board has held that the date that employer

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[9] Claimant incurred expenses as a result of his treatment from Dr. Bernicker. This treatment was not authorized by Respondent nor was the treatment obtained as a result of a work-related injury. Therefore, Claimant is not entitled to be reimbursed for these expenses.

knows of an injury, an obligation is incurred to pay benefits under 33 U.S.C. § 914(b). The date that employer knows of the injury is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996).

Employer knew of the Claimant's injury on May 15, 2000 and did not initiate the payment of benefits. As such, interest begins to accrue fourteen (14) days thereafter, from May 29, 2000.

ATTORNEY'S FEES AND COSTS

Thirty days (30) is hereby allowed to Claimant's counsel for the submission of an application for representative's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all of the parties, including Claimant, must accompany the application. All parties have fifteen (15) days following the receipt of any such application within which to file any objections to the application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record as a whole, the following shall become the final order of this court. Any specific numeric computations of the compensation award shall be performed by the District Director.

IT IS ORDERED THAT

1. Respondent, Marine Corps Exchange, shall pay Barry Parker compensation for temporary total disability due from May 16, 2000 through July 25, 2000 for the left knee and left ankle injuries that Claimant suffered on May 15, 2000, based on an average weekly wage of $408.40 and a compensation rage of $272.26

2. Respondent shall pay Barry Parker temporary partial disability benefits from July 25, 2000 through December 1, 2000, the date of maximum medical improvement in accordance with 33 U.S.C. § 8(e). The computation shall be made based on an average weekly wage before the injury of $408.40 and a post-injury earning capacity of $381.71.

3. Claimant is to receive no compensation nor any medical treatment for the low back injury that Claimant alleges occurred on May 15, 2000.

4. Claimant shall be entitled to interest on past due benefits.

5. Respondents shall receive credit for all amounts of compensation previously paid to Claimant as a result of the January 9,1998 accident.

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ROBERT J. LESNICK
Administrative Law Judge